

- (1) An Award was entered on December 29, 1993, by Administrative Law Judge George R. Robertson.
- (2) On January 11, 1994, the Appeals Board issued an Order approving the Award entered by Administrative Law Judge George R. Robertson on December 29, 1993.
- (3) On January 11, 1994, a request for review by claimant was received by telefacsimile and filed of record with the Division of Workers Compensation.
- (4) On January 19, 1994, the claimant's Motion to Reconsider and/or Set Aside Order was received and filed.
- (5) In support of his motion requesting that the Appeals Board set aside its Order approving the Award of Administrative Law Judge and reconsider its finding that the claimant's request for review was not timely filed, claimant contends that the Appeals Board should follow the provisions of K.S.A. 60-206(a) and (e) in calculating the time within which an appeal may be filed. Calculating time under either of those provisions would make the claimant's request for review timely. Unfortunately, the Appeals Board is of the opinion that the Rules of Civil Procedure under Chapter 60 of the Kansas Statutes Annotated do not control proceedings in the Division of Workers Compensation where there are specific statutes or regulations within the Workers Compensation Act which

provide for a separate procedure. The 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1) provides:

"All acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within ten (10) days and if no such request is made, then the board shall approve such actions, findings, awards, decisions, rulings or modifications of findings or awards of the administrative law judge."

The above language is an amendment to K.S.A. 1992 Supp. 44-551 previously pertaining to Director's reviews. Director's Rule 51-18-2 provides:

"The effective date of the administrative law judge's acts, findings, awards, decisions, rulings or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.

Application for review shall only be considered as timely filed if received in the central office or one of the district offices of the director on or before the tenth day after the effective date of the act of an administrative law judge."

K.S.A. 44-573 provides:

"The director may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workmen's compensation act."

Director's Rule 51-17-1 deals with the computation and extension of time and provides:

"The time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be a Saturday or Sunday or a statutory holiday, it is excluded."

That Director's Rule cites K.S.A. 44-573 as being authorized by said statute and also K.S.A. 60-206 as amended January 1, 1973. It appears that the Director's Rule was promulgated prior to the 1988 amendments to K.S.A. 60-206(a) to which claimant's counsel refers whereby intermediate Saturdays, Sundays and legal holidays are to be excluded in the computation of time when the period of time prescribed is less than eleven (11) days. It is the opinion of the Appeals Board that if the Rules of Civil Procedure and specifically K.S.A. 60-206 were to govern the procedures under the Kansas Workers Compensation Act then the Director's Rules concerning time computation and specifically Rule 51-17-1 would have been unnecessary. Whether or not it was intentional not to include the subsequent revisions of K.S.A. 60-206(a) in Director's Rule 51-17-1 or whether that was simply an absence of diligence in conforming the Director's Rules to the Rules of Civil Procedure we cannot say. However, this Appeals Board was not given authority to promulgate rules by the Legislature and is bound by the rules of the Director. Until such time as the Director sees fit to revise its rules we are compelled to follow the Director's Rules as written.

We agree with the contention of claimant's counsel that the ten (10) day time period is unrealistic and too short a period of time particularly when it does not allow for additional time being included for mail service as contemplated by K.S.A. 60-206(e). There are perhaps better ways that the statute could have been written such as to provide for thirty (30) days to perfect an appeal as was the procedure under the prior act for appeals from the order of the Director to district courts. However, we do not think the intent of the ten (10) day time limitation was intended simply as a trap laid for unwary claimants so as to deny citizens their rights of redress as counsel suggests. Rather the ten (10) day period follows the earlier statutory procedure for appeals from awards by the Administrative Law Judge to the Director for review. Nevertheless, we agree that in the absence of statutory modification, consideration should be given by the Director to conforming his rules for time computation to the Rules of Civil Procedure and specifically K.S.A. 1992 Supp. 60-206. Nevertheless, under the rules as currently written the claimant's appeal was due to be filed with the Division of Workers Compensation on or before January 10, 1994. It was not and therefore, the appeal was not timely filed. The January 11, 1994 Order of the Appeals Board approving the Award entered December 29, 1993, by the Administrative Law Judge should be and does remain in full force and effect. Claimant's Motion to Reconsider and/or Set Aside Order is denied.

IT IS SO ORDERED.

Filed in the Division of Workers Compensation on January __, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Michael G. Coash, P.O. Box 508, El Dorado, Kansas 67042
George R. Robertson, Administrative Law Judge
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January 25, 1994

George Gomez, Director
Division of Workers Compensation
800 SW Jackson, 7th Floor
Topeka, Kansas 66612

**RE: Motion to Reconsider and/or Set Aside Motion
Docket No. 172,265**

Dear George:

Please find enclosed a copy of the Order the Appeals Board has entered in connection with the above referenced claim. As you will note, claimant's counsel in that case filed a Motion to Consider and/or Set Aside Order approving the Award of the Administrative Law Judge which, in effect, likewise found the claimant's application for review to be out of time. We also enclose for your information a copy of the claimant's Motion to Reconsider and/or Set Aside Order. In that motion, claimant's counsel argues that the provisions of K.S.A. 1992 Supp. 60-206 should be utilized by the Appeals Board and the Division of Workers Compensation for purposes of time computation. The Appeals Board rejects this argument finding instead that it is bound by the Director's Rules on that subject. However, in review of the Director's Rules, it appears that they were based upon Rules of Civil Procedure as they previously read. We believe that consideration should be given to revising the applicable Director's Rules to conform to K.S.A. 60-206 as amended. In particular, the method of computing time when the period called for is less than eleven days would exclude intervening Saturdays, Sundays, and holidays. This would be particularly helpful in appeals to the Board given the short ten-day appeal time currently allowed by statute. Consideration might also be given to statutorily amending this appeal time to thirty days as it was for appeals through District Court from the Director.

George Gomez
January 25, 1994
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We would be happy to discuss these matters with you further should you so desire. Thank you for your consideration and attention to the concerns raised herein.

Sincerely,

Duncan A. Whittier

DAW:ms

Encl.